

## BC/Yukon Virtual Colloquium: Transforming the Family Justice System

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Nancy Cameron - Keynote Speech

"Transforming the family justice system by focussing on family well-being"

Transformation is not a word easily embraced by the justice sector. Transformation, coupled with the phrase, "we have no idea what this will look like," is enough to frighten anyone who has spent their career working in the dependably rule-bound status quo, of the current justice system. We are all comfortable with and we value the dependability and safeguards of judicial independence, precedent, and the Rule of Law.

Some of you may be thinking, "If transformation means caterpillar to butterfly, let us stay with the dependable, many-legged, caterpillar and leave the butterfly to the social workers, counsellors, and psychologists.

Why would we, the justice sector, step into a leadership role in this transformation? Why loosen our grip on what we know in order to encourage a transformation of the family justice system by focussing on family well-being?

Twenty two years ago, I had one of the most profoundly troubling cases of my career. My client's husband had made death threats against her. After she left, he stalked her, despite a restraining order, and he quickly alienated her two sons from her. The alienation was swift and severe. It extended to her entire side of the family, He also cut off contact between the boys and their surrogate grandmother, who was the former nanny of the children. The trial judge found that the youngest (who was 13) was at significant psychological danger if left in the father's home. Concurring with the psychologist, he found the child's well-being and best interests could only be met if he were ordered to live with the mother. The child ran away, and the Court of Appeal reversed the order. The SCC denied the mother's leave to appeal, but in a rare show of support for her position, awarded her costs.

My client had a masters degree in nursing. When I left the Court of Appeal with my client, she said to me, "Does the court keep any data? Do they have anyway of tracking to see how cases turn out?" I of course had to tell her the answer was no.

Over the years, former clients have contacted me to let me know how things turned out. Those of us who work in this field, often say, "Children vote with their feet." But I have also seen the damage that does to children, when they become the centre of the conflict.

Twenty two years went by before I received an email from my client, letting me know that her son, now 35, had reached out to her and they have met. They are now re-building their relationship.

But every single one of you that is a parent can only imagine, "what would it feel like to have my relationship with my child severed for 22 years? And what would it mean for

that child?”

Of course she feels frustration and anger with the system. The psychologist in that case, who not only appears as an expert witness in family matters but also in criminal matters, told me that what he hears from the public is a much higher degree of frustration with the family justice system than with the criminal justice system.

Courts have power. We depend on them to exercise that power, when needed. It is a blunt tool. Sometimes it works. But for the most part, it is insufficient for the complex and deeply human needs of the families that come to the justice system for help. Too often, the courts have not been able to use their power effectively to moderate the actions of a bully. The necessary systems operate in too many silos to be able to do that effectively, or, as in the case I just spoke about, the courts sometimes lament, “there is really nothing we can do.”

Martin Luther King Jr., speaking at the Southern Christian Leadership Conference in 1967, spoke about the relationship between power and love, and said:

“One of the great problems of history is that the concepts of love and power have usually been contrasted as opposites - polar opposites – such that love is identified as a resignation of power and power with a denial of love...What is needed is a realization that power without love is reckless and abusive, and love without power is sentimental and anemic. Power at its best is love, implementing the demands of justice, and justice at its best is love correcting everything that stands against love. ”

I have thought about these concepts often lately, and what they mean for those of us who work in the family justice system. When we look at the power that is so deeply entrenched in the courts, it is usually seen as “power over”. But, as my client would tell us, “Power over”, in the context of the family justice system, does not work. What is needed, in the context of the family justice system, is “power to”. This is the generative side of power, supported by love, which is our striving for unity. How we do this is not easy. It is difficult to grasp intellectually, let alone put into action, yet it is in this place that transformation thrives.

It is not the fault of the justice system that families come to it for assistance when they are at their most vulnerable and most stressed. But if we can transform the system, if we can look to the generative side of power, power infused by love, in a way that supports family well-being, is that not the obligation of leaders in the justice system?

Some of these changes are already happening. Lawyers, financial professionals and mental health professionals have helped thousands of families in British Columbia resolve matters in the Collaborative Process, where everyone agrees not to use adversarial methods and the whole family is supported not only in dispute resolution, but also dispute containment and the avoidance of future disputes. Mediation has likewise helped thousands of British Columbia families. And now the Provincial Court is

courageously trying out the Early Resolution provisions of the new Provincial Court rules. These have been in force in Victoria and in two weeks will roll out in Surrey.

We are lucky. We live in a time in where neuro-scientists are rapidly learning more and more about how our brains – those one billion neurons - work. Dr. John Gottman's research has shown that infants as young as three months react to parental conflict by showing lower abilities to concentrate, less joy, less ability to calm, and higher heart rates. Another Gottman research project followed three and four year olds for 24 hours, testing their urine every hour for cortisol levels. Those children whose parents expressed more marital hostility at home had significantly higher levels of cortisol in their urine than those children with less conflict in their homes. Gottman says, "When we're stressed, we regress." It is rumoured that he has gone so far as to say he can closely predict which couples will stay together by looking at the urine samples of their children. I find this stunning. And since we know that separation is an extremely stressful time for families, and that court processes exacerbate this stress, how can we possibly ignore the consequences this has on the children?

We have learned that Adverse Childhood Experiences can have significant, long term, detrimental effects on health and well-being, long after childhood is over.

We have also learned that trauma can be inter-generational. Epi-genetics has taught us the powerful consequences the environment can have on gene expression, and that these consequences can be passed on from one generation to the next.

We have arrived at that point in history where we need to make an intentional choice: do we continue to be the cautious caterpillar, a justice system married to an adversarial process for families, to an ethic of rights and obligations, or do we choose to take a leadership role and be informed by what neuro-science is telling us? Do we choose to take this knowledge and create a system that decreases, rather than increases, the stressors families are under? Do we choose to use the knowledge of brain science to embrace an ethic of care, and incorporate an ethic of care into the family justice system?

I am going to take a few minutes to talk about two different models of resolving moral dilemmas; Lawrence Kohlberg's ethic of justice, or rights and obligations, and Carol Gilligan's Ethic of Care.

In 1958, Lawrence Kohlberg, developed a moral taxonomy to describe six stages of moral development. He used male subjects to develop this taxonomy. His fourth stage he called Law and Order, with behaviour prescribed by laws, rules, performing one's duty, maintaining order and avoiding guilt. The fifth stage he called Social Contract/Legalistic, wherein the individual understands the relative nature of personal values and opinions, and behaviour is determined on socially agreed upon rights.

Striking in Kohlberg's taxonomy is the similarity between stages four and five and the

theories that our justice system is built on.

The care-oriented model was developed by Carol Gilligan. It is often referred to as an ethic of care, as opposed to an ethic of justice. Gilligan was a student of Kohlberg's, and she was struck by the fact that women tended to cluster below men in Kohlberg's taxonomy. She believed that Kohlberg's stages were based on a male model, and as such ignored the fact that women place great value on inter-connectedness, care and responsibility to others. Gilligan's model has three stages, with the third (highest) stage being a principle of non-violence and doing no harm to self or others.

Although most people – men and women - bring an ethic of care into personal moral decision making, this is not what an adversarial justice system has at its core. And yet, we would probably all agree that this is exactly what we would endeavour to bring to our own, deeply personal, family dilemmas.

As lawyers, we are deeply rooted in the ethic of justice. A study of law students found that the first year of legal education alters women students' moral decision-making processes. Women students in the study shifted from a predominantly care orientation, at the beginning of law school, towards a rights orientation by the end of first year law school. Male law students showed little change in their moral reasoning. Men in the study demonstrated a predominantly rights orientation both at the beginning and the end of first year law. Also, men were able to maintain the ratio of balance between care and rights thinking that they had entered law school with. Although men predominantly made decisions from a framework of rights and obligations, there were some decisions that they brought a care orientation to, and this form of balance became more ingrained for men by the end of first year.

This study exemplifies the challenges those of us in the justice system may have as we struggle with the concept of transforming the family justice system by focussing on family well-being.

Incremental innovation is what the justice system is used to. I know this. I spent eight years on the Supreme Court Rules Revision Committee.

In 1990 I presented a paper to a group of senior family law lawyers wherein I argued for the adoption of child support guidelines. There was not a lawyer in the room that supported the idea.

Moving away from our training in an adversarial model is difficult. In one of my early Collaborative cases, my colleague and I became so embroiled in arguing our positions, that when I hung up the phone and walked into my paralegal's office I cried. Not only was the other lawyer a colleague, I also considered her a friend. And I said to my paralegal, "If she and I can't do this, I don't know how I can expect this process to be successful."

But what I have learned is that we can do this. Those of us committed to working in Collaborative Process have seen our cases become more difficult, and more high conflict. Frankly, those who can resolve matters on their own are doing that. Yet as a Collaborative community, we have been able to support each other in the hard work that we do, and we manage to create enough support, in a non-adversarial setting, for clients to resolve even extremely difficult matters.

Richard Susskind, in his book “Online Courts and the Future of Justice” explores what he calls “Outcome Thinking”. He describes a manufacturer of drills who told his sales force that they weren’t selling drills, they were selling holes in the wall. Professor Farrow’s study, asking members of the public to define “justice” or “access to justice” and finding many responded with “the right to a good life” is classic outcome thinking. As we endeavour to embrace the concept of “transforming the family justice system to support family well being” and work to re-imagine the system, it will be helpful for us to use outcome thinking. Remember that the outcome we are looking for is one that reduces, rather than increases, toxic stress. A system that strengthens resilience. And a system that supports families, rather than escalating conflict.

When I read Susskind’s broad definition of access to justice as having four components:

Dispute Resolution

Dispute Containment

Dispute Avoidance

Legal health promotion

I was overjoyed! For once, I was reading a definition that resonated with what I knew people wanted from the justice system. And we know that the courts, in their present iteration, have only been designed with the first of these: dispute resolution - in mind. The Early Resolution project in Victoria and soon Surrey is groundbreaking in part because it strives to incorporate dispute containment from the outset.

We know the family justice system needs to be transformed. I was in provincial court recently. I had agreed to do a matter pro bono because it was so complex I could barely figure it out. My client, even with his PhD, had literally sat down in the registry and wept when the registry refused to file the document I had drafted for him. When I attended at the courthouse, I stood in front of the screen that scrolls through the list. I counted how many of the litigants had lawyers. More than 85% had no lawyer. And of the 15% that did have counsel, many of those were Ministry matters. Those lawyers were the ones with the Ministry contract.

I think we would all agree that family is the cornerstone of our communities, of our society, and of our country. And yet our family justice system needs to make a profound shift. We cannot ignore the science. We are beyond the time of incremental change. It is time to positively support families at their time of greatest need, a time of grief and restructuring, by transforming the family justice system to support family well-being.